11 U.S.C. § 522(f)(1)(A)
judicial lien
support judgment

In re Ulledahl, Case No. 398-38715-elp7, BAP No. 99-1376

12/15/99 BAP, aff'g ELP Unpublished

The BAP affirmed Judge Perris's ruling that a lien that arose out of a marital dissolution judgment could not be avoided pursuant to § 522(f)(1) as impairing debtor's homestead exemption. The dissolution court awarded debtor property that had been acquired and jointly owned during the marriage, but which was held solely in debtor's name by the time of the divorce. It also entered a money judgment for attorney fees. Although the debtor held real property in his own name before the dissolution, debtor's counsel conceded that, under Oregon law, the dissolution court had equitable power to reorder the debtor's interest in the property. Therefore, debtor's interest in the property was created simulaneously with the creation of the judgment lien, and under Farrey v. Sanderfoot, 500 U.S. 291 (1991), debtor could not use § 522(f)(1) to avoid wife's interest in the property.

With regard to a second lien arising out of a contempt judgment, the BAP affirmed Judge Perris's finding that the judgment was in the nature of support, and therefore could not be avoided under § 522(f)(1)(A).

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	) BAP No. OR-99-1376-MeRyK
JOEL HOWARD ULLEDAHL,	) Bk. No. 398-38715-elp7
Debtor.	)
JOEL HOWARD ULLEDAHL,	)
Appellant,	)
v.	) MEMORANDUM[1]
CHERYL VOLKENAND,	)
Appellee.	)

Argued and Submitted on October 21, 1999
at Portland, Oregon

Filed - December 15, 1999

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable Elizabeth L. Perris, Bankruptcy Judge, Presiding

Before: MEYERS, RYAN and KLEIN, Bankruptcy Judges.

[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except when relevant under the doctrines of the law of the case, res judicata or collateral estoppel. See BAP Rule 13 & Ninth Circuit Rule 36-3.

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I

The debtor moved to avoid two liens arising from a marital dissolution. The court denied the motion. It found that one lien was created simultaneously with the creation of the Debtor's interest in the property. It found the other lien was in the nature of support.

AFFIRMED.

II

FACTS

Joel Howard Ulledahl ("Debtor") filed for bankruptcy under Chapter 7 of the Bankruptcy Code in November 1998. He then filed a motion to avoid two judicial liens that arose out of a marital dissolution. He claimed the liens impaired his homestead exemption. Cheryl Volkenand ("Volkenand"), the Debtor's former wife, objected to the motion.

There are two judgments underlying the liens. In the first judgment ("First Judgment"), Volkenand was awarded $12,000 in attorneys' fees on May 21, 1997. In a supplemental judgment arising out of a contempt proceeding ("Contempt Judgment"), Volkenand was awarded $7,543 in additional attorney fees plus $392.60 in costs.

Volkenand argued that the First Judgment was not avoidable pursuant to Farrey v. Sanderfoot, 500 U.S. 291 (1991), because the interest was created simultaneously with the Debtor's acquisition of his interest in the property. Alternatively, she argued that the First Judgment was in the nature of support and could not be

avoided pursuant to Section 522(f)(1)(A). She also argued that this reasoning applied to the Contempt Judgment, that it too was in the nature of support.

The parties do not dispute the facts. While still married, the Debtor and wife acquired and jointly owned certain real property in Bend, Oregon ("Property"). Prior to the divorce, the Debtor became the sole owner of the Property when Volkenand deeded her interest to the Debtor in exchange for $10,000.

The marriage dissolution occurred in May 1997, at which time the family court was asked to make an equitable distribution of property. The dissolution judgment awarded the Debtor the Property, while giving Volkenand other real property that she held solely in her name. The family court recognized that the Debtor had received a greater share of assets and therefore awarded Volkenand a judgment of $12,000 for her attorneys' fees. The court specifically found that this amount was "less than the amount to which [she] would otherwise be entitled to as an equalizing judgment for property division . . . ."

Claims of contempt against the Debtor brought by Volkenand were heard by the family court in November 1997. The court found that the Debtor failed to meet certain provisions of the dissolution judgment regarding visitations, child support and transfers of personal property. This led to the Contempt Judgment.

When the Debtor filed for bankruptcy a year later, he listed the Property at a value of $141,000, and claimed a homestead exemption of $25,000. He also asserted that there were two deeds of trust securing debts of $89,529 and $35,466, for a total of

$124,995 in encumbrances. He then moved to avoid Volkenand's judgment liens on the basis that they impaired his homestead exemption. Volkenand did not dispute the Debtor's valuation of the Property. Nor does she dispute that her liens impair the exemption.

The bankruptcy court concluded that Farrey v. Sanderfoot applied to the First Judgment, that the Debtor obtained his interest in the Property simultaneously with the fixing of the judicial lien based on the First Judgment. It also concluded that the judicial lien based on the Contempt Judgment secured a debt that was in the nature of support and could not be avoided.

III

STANDARD OF REVIEW

The bankruptcy court's conclusions of law are reviewed de novo. In re Lam, 211 B.R. 36, 38 (9th Cir. BAP 1997). Factual findings are reviewed under a clearly erroneous standard. In re Chang, 163 F.3d 1138, 1140 (9th Cir. 1998).

IV

DISCUSSION

A. Debtor Cannot Avoid First Judgment Under Sanderfoot

Under Farrey v. Sanderfoot, "the critical inquiry remains whether the debtor ever possessed the interest to which the lien fixed, before it fixed. If he or she did not, § 522(f)(1) does not permit the debtor to avoid the fixing of the lien on that interest." 500 U.S. at 299. The Debtor argues that he was the

sole owner of the Property at the time of the dissolution, and the dissolution judgment did not affect his ownership interest in any way. He argues that Sanderfoot does not apply since he owned the entire interest prior to the creation of the lien.

The court concluded that because the family court had the equitable power to reorder the Debtor's interest in the Property, a point that Debtor's counsel conceded at the hearing before the bankruptcy court, that the Debtor's interest was effectively created at the same time as the lien by way of the dissolution judgment.

The court pointed to a series of cases in support of this conclusion. In re Foss, 200 B.R. 660 (9th Cir. BAP 1996)(applying Washington law); In re Barnes, 198 B.R. 779 (9th Cir. BAP 1996)(California law); In re Yerrington, 144 B.R. 96 (9th Cir. BAP 1992), aff'd, 19 F.3d 32 (9th Cir. 1994)(Alaska law).

In Foss, the Panel concluded that although the debtor owned the property in question as his sole property and had acquired that interest prior to the marriage, under Washington law the divorce court could reorder the parties' interests in the subject property, and therefore Sanderfoot applied and the lien could not be avoided.

In Barnes, the Panel concluded that the divorce court has the power to reorder the parties' interests in property, and therefore, the dissolution judgment created new interests to which the ex-spouse's lien would attach. Accordingly, it held that Section 522(f)(1) could not be used to avoid the judicial lien in that case.

In Yerrington, the debtor owned the subject property prior to

the marriage and continued to hold it solely in his name throughout the marriage. The Panel held that Alaska law allowed the divorce court to reorder the parties' interests for an equitable result even if this meant invading one spouse's property interests, and therefore, the dissolution decree destroyed the previous interests of the parties and created new ones. The fact that the husband had an interest in the property both before and after the dissolution decree was not determinative.

Again, at the hearing before the bankruptcy court, the Debtor's counsel conceded that the family court had the equitable power to reorder the parties' interests in the Property even though the Debtor held title solely in his name. The Debtor argues that the above cases should not apply because those states, unlike Oregon, are community property states.

The bankruptcy court correctly rejected this argument because this ignores the fact that, based on the family court's power to reorder the interests in the Property, Volkenand had an equitable interest in the Property that was destroyed when the dissolution judgment was entered. At the same time, the Debtor's interest in the Property was newly created free of Volkenand's equitable interest, but subject to the judicial lien created simultaneously with the Debtor's new interest. The court's equitable power and Volkenand's equitable interest existed under Oregon law and were not affected by the fact that Oregon is not a community property state.

The bankruptcy court correctly held that Sanderfoot was applicable pursuant to the reasoning of Foss, Barnes and

Yerrington. The Debtor could not avoid the First Judgment.

B. Contempt Judgment Cannot Be Avoided

The bankruptcy court recognized that in determining if a debt was in the nature of support the court was to consider the need of the recipient spouse, the presence of minor children, any imbalance in the relative income of the parties and whether the obligation terminated on the death or remarriage of the recipient spouse. In re Gibson, 103 B.R. 218, 221 (9th Cir. BAP 1989). The bankruptcy court also held that "[w]here the judgment is a result of post-dissolution proceedings, the court should consider the character of the underlying action." (citing to In re Ray, 143 B.R. 937 (D.Colo. 1992)). Furthermore, it held that "if fees are awarded in a contempt proceeding to enforce a support obligation, the award is considered to be in the nature of support." (citing to In re Sinewitz, 166 B.R. 786 (Mass. 1994)).

The court concluded that the Contempt Judgment was in the nature of support because it was awarded in a proceeding to enforce support and visitation provisions of the dissolution judgment. Furthermore, the issues raised by the Debtor that were litigated at the same time went to issues concerning the well-being of the children. The court also found that the state court made its award based, in part, on the financial need of Volkenand.

The Debtor's argument is that the Contempt Judgment had more to do with a sanction than it had to do with compensation or support. The Debtor fails to demonstrate that the court's findings of fact are clearly in error or that the court reached an erroneous conclusion of law.

The family court hearing was focused on issues of child support and welfare, and Volkenand was able to adequately demonstrate financial need. The court correctly ruled that the Debtor could not avoid the lien arising from the Contempt Judgment.

V

CONCLUSION

The court correctly ruled that the First Judgment created new interests to which Volkenand's lien attached. Accordingly, pursuant to Sanderfoot, the Debtor could not avoid the related lien.

Furthermore, the court correctly held that the Contempt Judgment was in the nature of support. Therefore, the Debtor could not avoid the lien arising from that judgment.

AFFIRMED.